Supreme Court, U.S.
FILED
DEC 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-390 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

LARRY PETERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

ANDREW LEVCHUK
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

15pp

QUESTIONS PRESENTED

1. Whether the district court erred in allowing the government to impeach the testimony of a witness with his prior conviction.

2. Whether the district court improperly relied on unsworn representations of the prosecutor in allowing the government to impeach its witness.

3. Whether the district court prevented defense counsel from making an adequate record of his dealings with a government witness.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Adickes v. *S. H. Kress & Co.*, 398 U.S. 144 (1970) 9
United States v. *Crouch*, 731 F.2d 621 (9th Cir. 1984), cert. denied, 469 U.S. 1405 (1985) 6
United States v. *DeLillo*, 620 F.2d 939 (2d Cir. 1980) 7
United States v. *Frappier*, 807 F.2d 257 (1st Cir. 1986), cert. denied, No. 86-6358 (Apr. 6, 1987) 6
United States v. *Hogan*, 763 F.2d 697 (5th Cir. 1985) 6, 7
United States v. *Hopkins*, 744 F.2d 716 (10th Cir. 1984) .. 3
United States v. *Johnson*, 802 F.2d 1459 (D.C. Cir. 1986) 6, 7
United States v. *Lovasco*, 431 U.S. 783 (1977) 9
United States v. *Morlang*, 531 F.2d 183 (4th Cir. 1975) ... 5
United States v. *Oxman*, 740 F.2d 1298 (3d Cir. 1984), vacated, 473 U.S. 922 (1985) 6
United States v. *Sebetich*, 776 F.2d 412 (3d Cir. 1985), cert. denied, No. 87-5859 (Jan. 11, 1988) 6
United States v. *Webster*, 734 F.2d 1191 (7th Cir. 1984) .. 6, 7, 8

Statutes and rules:

18 U.S.C. 371 2
18 U.S.C. 1343 2
Fed. R. Evid.:
Rule 105 8
Rule 402 8

Rules – Continued: Page

Rule 403 8
Rule 607 ..... 4, 6
Rule 609(a) 5, 8

Miscellaneous:

3 J. Weinstein & M. Berger, *Weinstein's Evidence* (1988) 6

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-390

LARRY PETERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 841 F.2d 1474.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1988. A petition for rehearing was denied on June 7, 1988 (Pet. App. 22). The petition for a writ of certiorari was filed on August 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Wyoming, petitioner was convicted on one

count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 371, and eight counts of wire fraud, in violation of 18 U.S.C. 1343. Petitioner was sentenced to three years' imprisonment, five years' probation, and a $2400 fine. The court of appeals affirmed petitioner's conviction, but remanded for resentencing (Pet. App. 1-21).[1]

1. The evidence at trial showed that petitioner was the mastermind of a fraudulent scheme that relied on "bait and switch" tactics to defraud consumers. Petitioner was the founder and owner of "Meat Masters," a chain of retail stores that sold sides of beef and other large quantities of meat. Meat Masters stores were located in Utah and Wyoming. The stores advertised their products on Salt Lake City and Cheyenne television stations and in print media throughout the area, representing that meat could be purchased for prices ranging from $.97 to $1.29 per pound. Consumers were invited to call a toll-free telephone number to arrange for appointments at one of the Meat Masters stores. Pet. App. 2, 6.

Upon arrival at the store, the consumer typically would be asked if he had ever before bought meat in bulk quantities. Most consumers admitted they had not. The sales representative would then show the consumer the meat available at the advertised sale prices. That meat was fatty and discolored (Pet. App. 6). The sales representative would then show the consumer other cuts of beef that were much more attractive (*ibid.*). That meat, however, was priced at $2.39 to $2.87 per pound. The representative would then try to convince the consumer that the more expensive meat actually was a "better buy" because that meat

---

[1] The court of appeals ordered petitioner to be resentenced because the district court failed to make adequate factual findings on disputed issues in the presentence report that may have influenced the sentencing decision (Pet. App. 14-21).

contained less waste than the cheaper meat on sale. One customer who sought to purchase the sale meat in spite of its appearance was told he could not have it, and other customers were told that advertised bonus meats were unavailable (*id.* at 7). Many customers bought the more expensive meat after listening to the sales pitch. *Id.* at 6-7.

2. At trial, the government called Mark Lundquist as a witness in its case-in-chief (Pet. App. 7-8). Lundquist was one of eight co-defendants who had been indicted along with petitioner, and he had initially stood trial with petitioner in 1981. Both petitioner and Lundquist were convicted, but petitioner's conviction was reversed on appeal. See *United States* v. *Hopkins*, 744 F.2d 716 (10th Cir. 1984) (en banc). Lundquist did not appeal his conviction. Pet. App. 2, 7.

Lundquist testified about his relationship with petitioner. He explained that he had signed a franchise agreement with petitioner to operate a Meat Masters store in Wyoming. Lundquist recounted that even though he was nominally running a franchise, he reported on a daily basis to petitioner's Utah office. Lundquist also testified that petitioner controlled all of the receipts from the Wyoming store. 2 Tr. 219-227. During the course of his direct examination, however, Lundquist denied that he had participated in a scheme to defraud (2 Tr. 231-232). Over defense counsel's objection (2 Tr. 232-244), the government impeached Lundquist with his prior convictions for conspiracy and wire fraud stemming from his participation in Meat Masters' activities (2 Tr. 245).

Petitioner moved for a mistrial, claiming that the government had called Lundquist as a witness for the impermissible purpose of introducing evidence of Lundquist's prior conviction under the guise of impeaching him. In support of that motion, petitioner submitted an affidavit from Lundquist in which Lundquist

asserted that the government knew he would deny any wrongdoing, as he had done at the first trial. The prosecutor represented to the district court, however, that he and the case agent had interviewed Lundquist in preparation for the second trial and were led to believe that Lundquist would admit that he had engaged in the activities alleged in the indictment. 4 Tr. 355-358; Pet. App. 10. The district court discredited Lundquist's affidavit, finding that he was "not a believable or a credible witness" (Pet. App. 11). The court accepted the government's statements, finding that the prosecutor had been "surprised" by Lundquist's testimony (*ibid.*). The court concluded therefore that Lundquist had been properly impeached. Accordingly, the court denied petitioner's motion for a mistrial.

3. On appeal, the court of appeals rejected petitioner's contention that the government had called Lundquist for the sole purpose of impeaching him with prejudicial evidence of his prior conviction. The court explained that under Fed. R. Evid. 607, the government may properly impeach its own witness's testimony (Pet. App. 8), but it cannot introduce evidence "under the guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible" (*id.* at 9 (citations omitted; emphasis in original)). The court of appeals observed that the "decisive issue for us is what the government expected Lundquist to say" (*id.* at 10). The court noted that the district court had heard from the prosecutor and petitioner and that the conflicting accounts of Lundquist and the government created a question of credibility "uniquely within the expertise of the trial court" (*id.* at 11). The court of appeals therefore accepted the district court's finding that the government "did

not call Lundquist with the primary purpose of introducing evidence of his prior conviction" (*ibid.*).[2]

ARGUMENT

1. Petitioner renews his claim (Pet. 6-8) that the prosecutor was improperly permitted to introduce Lundquist's prior conviction for impeachment purposes. In particular, petitioner objects to the court's holding that calling Lundquist as a witness and impeaching him with his prior conviction was proper as long as Lundquist was not called for the primary purpose of placing before the jury the evidence of Lundquist's prior conviction. Using a "primary purpose" or "good faith" test, petitioner claims, would "encourage[ ] the calling of a co-defendant if there is any hope of receiving favorable testimony because the failure to receive such may be an even greater benefit" (Pet. 8).

Petitioner's concerns are unfounded. The government should be free to call an obviously knowledgeable witness such as Lundquist as long as the prosecutor is not calling the witness "as a subterfuge to get before the jury evidence not otherwise otherwise admissible." *United States* v. *Morlang*, 531 F.2d 183, 190 (4th Cir. 1975) (footnote omitted). If the witness is called for a legitimate purpose, the prosecutor should be permitted to impeach the witness

---

[2] The court of appeals rejected petitioner's contention that evidence of Lundquist's prior conviction should have been excluded under Fed. R. Evid. 609(a). The court of appeals found that the district court had restricted the government's impeachment of Lundquist to minimize any danger of prejudice and thus had not abused its discretion in allowing the government to impeach Lundquist (Pet. App. 11-12). The court of appeals also held that the district court did not commit plain error in failing, sua sponte, to give a limiting instruction as to the permissible evidentiary use of Lundquist's conviction (*id.* at 12-14).

if the need arises. Rule 607 of the Federal Rules of Evidence, which permits a party to impeach his own witness, provides important protection against the risk that the witness will not give the testimony the prosecutor expects, or that the witness will give some testimony that is helpful to the prosecution but other testimony that is helpful to the defense. See *United States* v. *Webster,* 734 F.2d 1191, 1193 (7th Cir. 1984). In deciding whether to call the witness, the prosecutor must weigh the benefits against the risks, and in assessing the risks, it is perfectly legitimate for the prosecutor to take into account the prospect that if the witness gives damaging testimony, the government can blunt the effect of that testimony by impeaching him.[3] As long as the prosecutor's principal aim in calling the witness is to elicit relevant evidence, there is nothing improper about the prosecutor's intending to impeach the witness to undercut the harmful effect of any testimony that may be damaging to the government's case.

It is for that reason that the court in this case, like other courts of appeals,[4] scrutinized the prosecutor's reasons for

---

[3] It is also legitimate for the prosecutor to bring out impeachment material during the witness's direct examination in order to blunt the effect of defense impeachment or cross-examination. See *United States* v. *Oxman,* 740 F.2d 1298, 1302-1303 (3d Cir. 1984), vacated and remanded on other grounds, 473 U.S. 922 (1985).

[4] *E.g., United States* v. *Frappier,* 807 F.2d 257, 259 (1st Cir. 1986), cert. denied, No. 86-6358 (Apr. 6, 1987); *United States* v. *Johnson,* 802 F.2d 1459, 1466 (D.C. Cir. 1986); *United States* v. *Sebetich,* 776 F.2d 412, 428-429 (3d Cir. 1985), cert. denied, No. 87-5859 (Jan. 11, 1988); *United States* v. *Hogan,* 763 F.2d 697, 701-703 (5th Cir. 1985); *United States* v. *Webster,* 734 F.2d 1191, 1192-1193 (7th Cir. 1984); *United States* v. *Crouch,* 731 F.2d 621, 624 (9th Cir. 1984), cert. denied, 469 U.S. 1405 (1985); see generally 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 607[01] (1988).

calling a hostile witness who was then impeached with otherwise inadmissible evidence. By holding that the prosecutor's primary purpose must be to obtain useful evidence from the witness, and not simply to use the witness as a vehicle for introducing inadmissible evidence, the courts ensure that the prosecutor will not abuse the impeachment rule. At the same time, however, the "primary purpose" or "good faith" rule recognizes that a prosecutor may validly intend to impeach the witness for the proper purpose of calling into question the credibility of any damaging testimony the witness may give.

Other courts of appeals have uniformly adopted a "primary purpose" or "good faith" test in ruling on the legitimacy of a party's impeachment of its own witness. See, *e.g.*, *United States* v. *Johnson,* 802 F.2d 1459, 1466 (D.C. Cir. 1986) (inappropriate for prosecution to call hostile witness "not for any testimony he could be expected to give, but for the sole purpose of bringing about the admission of a post-arrest statement that, as the prosecution well knew or should have known, was not independently admissible" (footnote omitted)); *United States* v. *Hogan,* 763 F.2d 697, 701-703 (5th Cir. 1985) (conviction reversed where government called hostile witness for primary purpose of impeaching him with otherwise inadmissible evidence); *United States* v. *Webster,* 734 F.2d at 1193 (adopting "good faith" test); *United States* v. *De Lillo,* 620 F.2d 939, 946 (2d Cir. 1980) (witness not called by the government "as a subterfuge with the prima y aim of getting to the jury a statement impeaching him"). Contrary to petitioner's assertion, the standard applied by the courts of appeals affords substantial protection against the government's abuse of its ability to impeach a witness in order to present otherwise inadmissible evidence to the jury.

Apart from the willingness of courts to inquire into the true purposes for which impeachable witnesses are called,

the Federal Rules of Evidence provide additional protection against the misuse of the right to impeach a party's own witnesses. First, the testimony of such witnesses must satisfy the threshold relevancy requirement under Rule 402. Second, Rule 403 provides that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice * * * " (Fed. R. Evid. 403). In each case where the government seeks to impeach its witness with otherwise inadmissible evidence, the government must respond to a timely objection by showing the probative value of the expected impeachment testimony. If the danger of unfair prejudice outweighs that probative value, the testimony will not be admitted. See, *e.g., United States* v. *Webster,* 734 F.2d at 1192-1193; see also Fed. R. Evid. 609(a) (evidence of prior felony conviction may be excluded where "the court determines that the probative value of admitting this evidence [does not] outweigh[ ] its prejudicial effect to the defendant").[5] Finally, the defendant can minimize the possibility of prejudice from impeachment by requesting a limiting instruction under Rule 105.[6]

The record in this case shows that the government did not call Lundquist to the stand as a subterfuge for intro-

---

[5] In this case, both the district court (2 Tr. 236-240) and the court of appeals (Pet. App. 10-12) correctly rejected petitioner's argument under Rule 609(a), because Lundquist gave probative testimony regarding petitioner's control over Meat Masters stores (see 2 Tr. 220-230). In addition, the district court carefully circumscribed the government's impeachment of Lundquist (see 2 Tr. 239-243; Pet. App. 10-12).

[6] Here, petitioner did not request any limiting instruction. The court of appeals concluded (Pet. App. 12-14) that in light of the substantial evidence of petitioner's involvement in the fraudulent scheme the district court's failure to instruct the jury on its own did not amount to plain error.

ducing his prior conviction into evidence. Lundquist provided valuable testimony as to petitioner's control over the Meat Masters operation. Despite signing an agreement to operate his own franchise, Lundquist testified that he sent all his receipts to petitioner and that he reported to petitioner's Utah office on a daily basis (2 Tr. 223-227). Lundquist's testimony supported the government's contention that petitioner was the mastermind of the conspiracy and was directly involved in the operation of the fraudulent scheme charged in the indictment. In addition, as both the district court and the court of appeals found (Pet. App. 11), the prosecutor and the case agent interviewed Lundquist before the second trial and were led to believe that he would testify to his participation in the crimes charged. Petitioner's claim (Pet. 8) that the government called Lundquist simply in order to parade his conviction before the jury is therefore meritless.

2. Petitioner also contends (Pet. 8-11) that in sanctioning the prosecutor's impeachment of Lundquist, the district court improperly relied on unsworn representations of the prosecutor, while refusing to credit the contrary assertions in the sworn affidavit submitted by Lundquist. Petitioner did not raise that argument before either the district court or the court of appeals, and he has therefore not preserved the issue for review. *E.g., United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970). In fact, when the trial judge stated that he would accept the prosecutor's in-court representations in lieu of a sworn affidavit, petitioner made no complaint that the prosecutor should be required to provide an affidavit explaining his decision to call Lundquist, and he did not suggest that the prosecutor's unsworn representations should be entitled to less weight because they were not made as formal testimony or in affidavit form. 4 Tr. 357-358. In any event, courts

routinely rely on representations of counsel in making evidentiary rulings during trial, without requiring that those representations be reduced to affidavit form. For example, counsel may be called on to represent that he or she has a good faith factual basis for asking a particular question on cross-examination. Similarly, in making evidentiary rulings, courts often must rely on attorneys' proffers of the testimony they expect to elicit. Absent unusual circumstances, the court is entitled to rely on the representations of counsel in such cases; the court need not require that counsel be sworn and forced to take the stand. In this case, likewise, the court could legitimately rely on the prosecutor's representations concerning Lundquist's expected testimony, at least where petitioner's counsel did not object to the court's acceptance of the government's proffer in that form.

3. Finally, petitioner contends (Pet. 12-13) that the district court prevented him from making an adequate record of his dealings with Lundquist. Again, petitioner did not raise that claim before either the district court or the court of appeals, and he has therefore not preserved the issue for review. Moreover, the record shows the claim is meritless. During argument on petitioner's objection to the government's impeachment of Lundquist, petitioner's counsel stated that he and Lundquist had discussed the case the previous evening. The district court responded that Lundquist's cooperation with petitioner appeared to support the government's contention that Lundquist was a hostile witness. 2 Tr. 235-236. Although argument on petitioner's objection continued for some time after the court's comment (see 2 Tr. 236-244), petitioner's counsel chose not to apprise the court of further details of his meeting with Lundquist. The court heard argument on petitioner's motion for a mistrial two days later, at which time petitioner's counsel and government counsel set forth their

legal arguments and the factual representations on which they based those arguments (4 Tr. 352-358). The court did not finally resolve the mistrial motion until several days later. At any point during that time counsel could have supplemented his remarks concerning his meeting with Lundquist, but he did not do so. Thus, petitioner's counsel had ample opportunity to make what he considered to be an adequate record on the mistrial issue. The district court did not hamper petitioner's ability to present any evidence that would have been relevant to petitioner's motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
ANDREW LEVCHUK
Attorney

DECEMBER 1988

U.S. GOVERNMENT PRINTING OFFICE 1988 -- 241 699 00001